No. 01-10940-CFH Title: James Edward Price, Petitioner
v.
United States

Docketed: June 25, 2002 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jun 18 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 30, 2002)
	Jul 1 2002	Waiver of right of respondent United States to respond filed.
	Jul 11 2002	DISTRIBUTED for Conference of September 30, 2002
	Jul 31 2002	Response requested. (Due August 30, 2002)
	Aug 20 2002	Order extending time to file response to petition until September 30, 2002.
	Sep 30 2002	Brief of respondent United States in opposition filed.
	Oct 10 2002	REDISTRIBUTED for Conference of November 1, 2002
	Oct 15 2002	Reply brief of petitioner James E. Price filed.
	Nov 4 2002	REDISTRIBUTED for Conference of November 8, 2002
	Nov 12 2002	REDISTRIBUTED for Conference of November 15, 2002
	Nov 22 2002	REDISTRIBUTED for Conference of November 27, 2002
	Dec 2 2002	REDISTRIBUTED for Conference of December 6, 2002
	Dec 9 2002	REDISTRIBUTED for Conference of December 13, 2002
	Jan 6 2003	REDISTRIBUTED for Conference of January 10, 2003
	Jan 13 2003	REDISTRIBUTED for Conference of January 17, 2003
	Jan 21 2003	Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of United States v. LaBonte, 520 U.S. 751, 759-760 (1997), and the Solicitor General's acknowledgement that the Court of Appeals "erred in concluding that petitioner's drug possession offense qualified as a predicate felony" under 18 U.S.C. Sec. 924(c) in the absence of notice under 21 U.S.C. Sec. 851(a). Brief in Opposition 12. Dissenting opinion of Justice Scalia with whom the Chief Justice and Justice Thomas join. Dissenting opinion of Justice Kennedy. (Detached opinion.)

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IPP

ORIGINAL

No. 01-10940

In the Supreme Court of the United States

October Term, 2001

JAMES EDWARD PRICE, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
JUN 18 2002
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit's ruling that the statutory maximum for Price's simple drug possession offense was the enhanced maximum, even in the absence of an enhancement information, conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997).

No. _____

In the Supreme Court of the United States

October Term, 2001

JAMES EDWARD PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner James Edward Price respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 18, 2001.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1

STATUTES INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S RULING THAT THE STATUTORY MAXIMUM FOR PRICE'S SIMPLE DRUG POSSESSION OFFENSE WAS THE ENHANCED MAXIMUM, EVEN IN THE ABSENCE OF AN ENHANCEMENT INFORMATION, CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES V. LABONTE*, 520 U.S. 751 (1997). 6

CONCLUSION 8

APPENDIX A *United States v. Price*, No. 00-51078 (5th Cir. Dec. 18, 2001) (unpublished)

APPENDIX B Denial of Petition for Rehearing, March 20, 2002

APPENDIX C 21 U.S.C. § 844(a)

APPENDIX D 21 U.S.C. § 851

TABLE OF AUTHORITIES

Page

Cases

Suveges v. United States, 7 F.3d 6 (1st Cir. 1993) 7

United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997) 6

United States v. LaBonte, 520 U.S. 751 (1997) . . . . . i, 2, 6, 7, 8

United States v. Polanco, 29 F.3d 35 (2d Cir. 1994) 6

United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir. 1996) 6

United States v. Steen, 55 F.3d 1022 (5th Cir. 1995) 7

Statutes

18 U.S.C. § 924(c) 4, 5, 6

18 U.S.C. § 924(c)(1) 1, 4

18 U.S.C. § 924(c)(1)(A) 6

21 U.S.C. § 841 7

21 U.S.C. § 844 1

21 U.S.C. § 844(a) 4, 5, 7, 8

21 U.S.C. § 851 . . . . . 1, 2, 5, 7, 8

21 U.S.C. § 851(a)(1) 7, 8

28 U.S.C. § 944(h) 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 . . . . . 1, 3

Rule

Supreme Court Rule 13.3 1

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, styled *United States v. Price,* No. 00-51078 (5th Cir. Dec. 18, 2001) (unpublished), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2001. A petition for rehearing was timely filed, and it was denied on March 20, 2002.[1] This petition is filed within 90 days after the date rehearing was denied. See SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The texts of Title 21 U.S.C. §§ 844(a) and 851 are reproduced in Appendices C and D.

STATEMENT

Petitioner James Edward Price was convicted and sentenced in 1998 on charges that he possessed drugs and that he used or carried a firearm during that drug offense. After losing his direct appeal, Price sought collateral relief under 28 U.S.C. § 2255, and the district court exercised jurisdiction under that provision. The district court denied relief.

The Court of Appeals reversed. It ruled that Price's sentence for simple drug possession was unlawful. But it upheld his conviction for possession of a firearm during a drug felony, under 18 U.S.C. § 924(c)(1).

---

1. The denial of the petition for rehearing is Appendix B.

It did so based on its finding that Price's simple drug possession offense qualified as a drug felony because it was potentially subject to recidivist enhancement even though no enhancement information under 21 U.S.C. § 851 had been filed. While the procedural background of Price's case is complex, it resolves to a single issue: whether the Fifth Circuit's ruling that the statutory maximum for Price's simple drug possession offense was the enhanced maximum, even in the absence of an enhancement information, conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997).

A. Trial and Sentence in District Court.

In February 1998, Price, a 59-year-old Army veteran, was found in possession of cocaine base. The drugs, along with an unloaded handgun, were discovered after police arrested Price for a traffic violation. He went to trial before a jury on charges that he possessed the drugs with intent to distribute, and that he used or carried a firearm during that drug trafficking offense.

Price, who owned and operated Sonny's Barbecue, a small business in Hillsboro, Texas, testified at trial about how he innocently came to possess the drugs. He also testified that he did not intend to distribute or unlawfully possess them. As for the handgun, Price explained that he had lawfully purchased it for his wife, who was studying to become a police officer.

Prosecution witnesses disputed some of Price's explanations, and the Government argued that Price had knowingly possessed the cocaine base with intent to distribute it. The Government also contended that Price was

guilty of carrying a firearm during that offense because he had a handgun in his truck.

The jury acquitted Price of possession with intent to distribute, but convicted him of the lesser-included offense of simple drug possession, and of the firearm offense. He was sentenced to consecutive imprisonment terms totalling 123 months—63 months on the drug offense and 60 months on the firearm offense.

B. Price's Direct Appeal.

On appeal, Price's attorney argued that the evidence failed to prove a nexus between his firearm and drug offenses, that the jury instructions failed to adequately explain an element of the firearm offense, and that the trial court should have ordered further deliberations after the jury returned an altered verdict form. App. A at 2. The Fifth Circuit affirmed the convictions and sentences. *Id.*

C. Price's § 2255 Petition and the Fifth Circuit's Ruling.

Relying on Fifth Circuit precedent, Price filed a pro se motion under 28 U.S.C. § 2255, alleging that counsel's ineffective assistance resulted in a sentence that exceeded the statutory maximum for his simple drug possession offense. and in an improper conviction and sentence for use of a firearm during a drug trafficking offense. The Court of Appeals granted a certificate of appealability, appointed counsel, and considered Price's § 2255 appeal.

The Court ruled that trial and appellate counsel were ineffective for failing to challenge Price's 63-month sentence for simple possession of cocaine base. App. A. 2–4. Under Fifth Circuit precedent, Price's

conviction of the lesser offense was punishable under the first sentence of 21 U.S.C. § 844(a), which provided for maximum statutory terms of one to three years' imprisonment, depending on whether a defendant had prior drug convictions.[2] App. A at 3. Because Price's 63-month sentence exceeded these statutory maximums, it was an illegal sentence. *Id.* at 3–4.

The Court rejected Price's challenge to his firearm conviction and sentence, however. App. A at 4. Price had argued that, because his simple drug possession offense was punishable by no more than one year, and was therefore only a misdemeanor, it could not support a firearm conviction under 18 U.S.C. § 924(c), as that provision applied to firearms used or carried during a felony drug offense. App. A at 4. Relying on the presentence report's recitation that Price had two prior drug convictions,[3] the Fifth Circuit ruled that "[h]ad Price been correctly sentenced under § 844(a), the [district] court would have noted his two prior drug convictions, and Price would have faced a statutory maximum of either two or three years, rendering his drug possession a felony under § 924(c)(1)." App. A at 4.

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2. In pertinent part, § 844(a) provides: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction . . . for any drug . . . offense . . . he shall be sentenced to . . . no more than 2 years . . . except, further, that if he commits such offense after two or more prior convictions for any drug . . . offense . . . he shall be sentenced to . . . . not more than 3 years[.]" The complete text of 21 U.S.C. § 844(a) is reproduced as Appendix C.

3. Price disputed the accuracy of this recitation. *See* App. A at 4 n.7.

Price filed a petition for rehearing, arguing that his simple possession offense was not punishable by either two or three years because the Government had failed to file an enhancement notice as required by 21 U.S.C. § 851. Without a § 851 enhancement information, Price's § 844(a)'s offense of simple possession of a controlled substance was punishable by no more than one year's imprisonment. Therefore, it was not a felony and could not support his § 924(c) conviction for using or carrying a firearm during a drug felony. The petition for rehearing was denied. App. B.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S RULING THAT THE STATUTORY MAXIMUM FOR PRICE'S SIMPLE DRUG POSSESSION OFFENSE WAS THE ENHANCED MAXIMUM, EVEN IN THE ABSENCE OF AN ENHANCEMENT INFORMATION, CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES V. LABONTE*, 520 U.S. 751 (1997).

The Fifth Circuit upheld Price's conviction for carrying a firearm during a drug felony[4] on the theory that the enhanced statutory maximum sentence for his simple drug possession offense was either two or three years, thus qualifying that offense as a felony. *See* App. A at 4. No enhancement notice had ever been filed in Price's case, however. In *United States v. LaBonte,* this Court found that, if no enhancement notice has been filed, the statutory maximum punishment is the unenhanced statutory maximum—not the enhanced maximum. 520 U.S. at 751, 759–60 (1997). Because the Fifth Circuit's ruling conflicts with *LaBonte,* this Court should grant certiorari and correct the court of appeals' error.

In *LaBonte,* this Court considered the validity of U.S. sentencing guidelines that calculated the statutory maximum sentence for certain "career offenders" without including their eligibility for recidivist enhancements under the drug laws. 520 U.S. 752–55. The Court concluded that the guidelines incorrectly determined the statutory maximum

4. Section 924(c) punishes a defendant who uses or carries a firearm during or in relation to "any drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). The Fifth Circuit, like other courts of appeals, has interpreted the term "drug trafficking offense" to include a simple drug possession offense, if it is a felony. *See United States v. Hinojosa-Lopez,* 130 F.3d 691, 694 (5th Cir. 1997); *see also, e.g., United States v. Restrepo-Aguilar,* 74 F.3d 361, 365 (1st Cir. 1996) (same); *United States v. Polanco,* 29 F.3d 35 (2d Cir. 1994) (same).

for these offenders because they overlooked that there are "two distinct categories of repeat offenders"—those "who have received notice [of enhancement] under § 851(a)(1) and those who have not." 520 U.S. at 759.

For "defendants who have received the notice under § 851(a)(1)," the statutory maximum, for purposes of 28 U.S.C. § 944(h), is the "enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." 520 U.S. at 759–60. Although the *LaBonte* Court was interpreting 28 U.S.C. § 944(h), its reasoning applies equally in Price's case, because the Court based its decision on Congress's statutory scheme for sentencing repeat offenders under Title 21, and Title 21's recidivist provisions apply to Price. *See* 520 U.S. at 758–59 (discussing repeat offender provisions of 21 U.S.C. § 841).

Under these provisions, Price did not qualify for recidivist enhancement because no § 851 notice had been filed in his case.[5] Indeed, the absence of such notice precluded any sentence greater than one year. *See LaBonte,* 520 U.S. at 754 n.1 (enhanced penalty may not be imposed unless Government files § 851 enhancement notice before trial or plea); *United States v. Steen,* 55 F.3d 1022, 1025 (5th Cir. 1995) (no enhancement permitted without § 851 enhancement notice); *Suveges v. United States,* 7 F.3d 6, 10 (1st Cir. 1993) (same). Apparently relying on the unrealized potential for § 844(a) enhancement, however, the Fifth Circuit ruled that

5. As the Fifth Circuit noted, there was a factual dispute about the existence of Price's alleged prior convictions. App. A at 4 n.7.

Price's simple drug possession offense was a felony because the maximum statutory term for that offense either two or three years under § 844(a)'s recidivist provisions. *See* App. A at 4.

The Fifth Circuit's ruling conflicts with *LaBonte*'s dictate that: "for defendants who have received the notice under § 851(a)(1) . . . the maximum term authorized is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." 520 U.S. at 759 (internal quotations omitted). For Price, who did not receive a § 851 notice, the unenhanced maximum of one year applies. The Fifth Circuit's contrary ruling must be reversed.

CONCLUSION

FOR THESE REASONS Price asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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DATED: June 18, 2002.

APPENDIX A

United States v. Price,
No. 00-51078 (5th Cir. Dec. 18, 2001) (unpublished)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 18 2001
CHARLES R. FULBRUGE III
CLERK

Nº 00-51078
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES EDWARD PRICE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
Nº W-99-CV-287

Before JONES, SMITH, and
EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

James Price appeals the denial of his motion for collateral, post-conviction relief under 28 U.S.C. § 2255. We conclude that Price's trial and appellate counsel rendered constitutionally ineffective assistance by failing to raise dispositive circuit precedent holding that a sentence such as his exceeded the statutory maximum. Accordingly, we reverse and remand.

I.

In April 1998, Price was indicted on one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and one count of using and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c). The district court instructed the jury that even if it did not find Price guilty beyond a reasonable doubt of possession with intent to distribute a controlled substance, it could find him guilty of the lesser included offense of simple possession.

The jury found Price not guilty on count one but guilty of the lesser included offense of possession of cocaine base and guilty on count two. The court sentenced him to sixty-three months' imprisonment for his drug possession under § 844(a) and sixty months' imprisonment for his firearm offense. On appeal, Price argued that (1) the evidence was insufficient to prove a nexus between his firearm and drug trafficking offense; (2) the jury instructions failed to explain the "in regard to" element of the firearm offense; and (3) the court should have required the jury to deliberate anew after it returned an altered verdict form. Price's lawyer did not argue that the sentence exceeded the statutory maximum under § 844(a), nor did he raise *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994), *overruled on other grounds*, *Apprendi v. N.J.*, 530 U.S. 466 (2000), in which we decided this very point. We affirmed the conviction.

Price filed a § 2255 motion, arguing that (1) his sentence exceeded the statutory one-year maximum under § 844(a); (2) he did not commit an underlying felony supporting conviction under § 924(c); (3) his trial and appellate counsel were ineffective for failing to challenge his sentences under § 844(a) and § 924(c); and (4) the government violated *Brady v. Md.*, 373 U.S. 83 (1963), by failing to point out that his sentence exceeded the statutory maximum. He amended his petition to include claims under *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi*. The district court denied Price's petition and, later, his request for a certificate of appealability ("COA"). We granted a COA on the ineffective assistance claims and appointed counsel on appeal.

II.

For denial of a § 2255 petition, we review factual findings for clear error and conclusions of law *de novo*. *United States v. Jones*, 172 F.3d 381, 383 (5th Cir. 1999). The guarantee of effective assistance of counsel extends to the first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 394 (1995); *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). We judge trial and appellate counsel's performance under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984): Price must show that his lawyers' performance was deficient and that the deficiency caused him prejudice. *Green v. Johnson*, 160 F.3d 1029, 1035, 1043 (5th Cir. 1998).

A.

Price argues that his sentence exceeds the statutory maximum for drug possession as a lesser included offense under § 844(a) and that his lawyers were deficient for not objecting. To prove deficient performance, Price must show his lawyer's "representation fell below an objective standard of reasonableness." *Washington*, 466 U.S. at 688. Although "[o]ur review is deferential," *Williamson*, 183 F.3d at 462, and we do not require counsel to "raise every nonfrivolous grounds of appeal available," *Green*, 160 F.3d at 1043, "[s]olid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention," *Williamson*, 183 F.3d at 463. Price's lawyers fell below this standard of reasonable assistance.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Section 844(a) provides a range of penalties for possession of a controlled substance.[2] The "first and second sentences" of that subsection prohibit possession of any quantity of "a controlled substance" and establish maximum penalties ranging from one to three years. *Deisch*, 20 F.3d at 143. The "third sentence" of § 844(a) prohibits possession of "a mixture or substance which contains cocaine base" if the amount exceeds a given quantity; the penalty is twenty years' imprisonment. *Id.* at 144.

The district court must have sentenced Price under the third sentence, the only part allowing a sixty-three-month sentence. This was error. In *Deisch*, 20 F.3d at 152, we held that "a violation of the third sentence of section 844(a) cannot be a lesser included offense under an indictment charging possession with intent to distribute in violation of section 841(a)(1)."

The facts in *Deisch* are nearly identical to those here,[3] so the holding is dispositive as to Price; Price's attorneys had an obligation to unearth it. *See Williamson*, 183 F.3d at 462 ("[A] reasonable attorney has an obligation to research relevant facts and law . . . ."). Further, at the time of Price's sentencing, *Deisch* had been on the books for over four years and had been invoked at least three times by this court;[4] counsel has no excuse for failing to discover it.[5] Price's lawyers failed to provide objectively reasonable assistance.

Price suffered prejudice if his lawyers' errors caused him to serve "any amount of actual jail time." *Glover v. United States*, 531 U.S. 198, 203 (2001). Under the first two provisions of § 844(a), Price could have been sentenced to a maximum of three years; instead, he was sentenced to more than five. *Deisch* is directly controlling precedent. It is certain that had Price's lawyer raised *Deisch* at sentencing or on appeal,[6] Price would have received a lighter sentence.

B.

Price challenges his sentence under § 924(c)(1) for using or carrying a firearm during and in relation to drug possession. He argues that his drug possession was a misdemeanor, and § 924(c)(1) applies only to felony offenses and that his lawyer rendered ineffective assistance by failing to object.

Because Price's claim is without merit, we conclude that his lawyers were neither deficient nor caused prejudice by failing to raise it. Under federal law, any offense for which a sentence of more than one year may be imposed is a felony. 18 U.S.C. § 3559(a); *United States v. Garrett*, 984 F.2d 1402, 1412 n.22 (5th Cir. 1993). Had Price been correctly sentenced under § 844(a), the court would have noted his two prior drug convictions,[7] and Price would have faced a statutory maximum of either two or three years,[8] rendering his drug possession a felony under § 924(c)(1).

The order denying relief under § 2255 is REVERSED, and this matter is REMANDED for further proceedings, as appropriate.

---

[2] Section 844(a) states:

> [1] It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order . . . . [2] Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction . . . for any drug or narcotic offense . . . he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years . . . except, further, that if he commits such offense after two or more prior convictions . . . for any drug or narcotic offense . . . he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years . . . . [3] Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 1 gram.
>
> 21 U.S.C. § 844(a).

[3] In *Deisch*, the indictment alleged possession of cocaine base; the defendant was acquitted under § 841(a)(1) but convicted for the lesser included offense of possession under § 844(a) and was sentenced to a sixty-month prison term under § 844(a).

[4] *See United States v. Hunt*, 129 F.3d 739, 745 (5th Cir. 1997); *United States v. Lucien*, 61 F.3d 366, 372 (5th Cir. 1995); *United States v. Steen*, 53 F.3d 1022, 1030 (5th Cir. 1995).

[5] *Cf. Williamson*, 183 F.3d at 462-63 (concluding counsel's failure to cite case decided after appeal was filed but before brief was submitted constituted deficient performance).

[6] Because Price's lawyer did not object at sentencing, his hypothetical appeal would have been reviewed for plain error. "A court plainly errs when it commits (1) an error (2) that is plain, *i.e.*, clear and obvious, (3) that affects the defendant's substantial rights," and affects the fairness, integrity, or public reputation of judicial proceedings. *Williamson*, 183 F.3d at 463 (citing *United States v. Olano*, 507 U.S. 725, 731-36 (1993); *United States v. Calverly*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc)). We still conclude that counsel's failure to raise *Deisch* prejudiced Price, so even under plain error review we would have been compelled to vacate and remand for resentencing.

[7] In 1976, Price pleaded guilty to possession of marihuana and served one day in jail. In 1988, he pleaded guilty to possession of a controlled substance and was sentenced to one day in jail and assessed $90.50 in court costs. Price claims this latter conviction has been vacated.

[8] *See* 21 U.S.C. § 844(a) (enhancing sentence for defendants with a final, "prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State").

APPENDIX B

Denial of Petition for Rehearing,
March 20, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-51078

U.S. COURT OF APPEALS
FILED
MAR 20 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES EDWARD PRICE

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, Waco

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ON PETITION FOR REHEARING

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

FEDERAL PUBLIC DEFENDER
RECEIVED
MAR 25 2002
WESTERN DIST. OF TEXAS
SAN ANTONIO, TEXAS

APPENDIX C

21 U.S.C. § 844(a)

(4) The court shall proceed as soon as practicable to the hearing and determination of such an action. An action under this subsection is governed by the Federal Rules of Civil Procedure except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

(Pub.L. 91–513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95–633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776; Pub.L. 98–473, Title II, § 516, Oct. 12, 1984, 98 Stat. 2074; Pub. L. 99–570, Title I, § 1866(a), Oct. 27, 1986, 100 Stat. 3207–54; Pub.L. 100–690, Title VI, § 6057, Nov. 18, 1988, 102 Stat. 4319; Pub.L. 103–200, § 3(g), Dec. 17, 1993, 107 Stat. 2337; Pub.L. 103–322, Title IX, § 90106, Sept. 13, 1994, 108 Stat. 1988; Pub.L. 104–237, Title II, §§ 203(a), 206(b), Oct. 3, 1996, 110 Stat. 3102, 3103.)

[1] So in original. Probably should be capitalized.

HISTORICAL AND STATUTORY NOTES

References in Text

Schedules I and II, referred to in subsec. (a)(1), are set out in § 812(c) of this title.

"This subchapter", referred to in subsecs. (a)(4)(A), (6), (7), (9), (b), and (c), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables.

"Subchapter II of this chapter", referred to in subsecs. (a)(4)(A), (6), (7), (9), (b), and (c), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see Tables volume.

The Federal Rules of Civil Procedure, referred to in subsec. (f)(4), are set out in Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in subsec. (f)(4), are set out in Title 18, Crimes and Criminal Procedure.

Effective and Applicability Provisions

1993 Acts. Amendment to this section by Pub.L. 103–200, to take effect on the date that is 120 days after the date of enactment of Pub.L. 103–200, which was approved Dec. 17, 1993, see section 11 of Pub.L. 103–200, set out as a note under section 802 of this title.

1988 Acts. Amendment by section 6057 of Pub.L. 100–690 effective 120 days after Nov. 18, 1988, see section 6061 of Pub.L. 100–690, set out as a note under section 802 of this title.

1978 Acts. Amendment by Pub.L. 95–633 effective Nov. 10, 1978, except as otherwise provided, see § 203(a) of Pub.L. 95–633, set out as a note under § 830 of this title.

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 91–513, set out as a note under § 801 of this title.

Effective Date of Repeal

Pub.L. 96–359, § 8(b), Sept. 26, 1980, 94 Stat. 1194, repealed § 203(d) of Pub.L. 95–633, formerly set out as a note under this section, which had provided for the repeal of subsec. (a)(4)(B) of this section effective Jan. 1, 1981.

§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the posses-

sion of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub.L. 98–473, Title II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

(Pub.L. 91–513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264; Pub.L. 98–473, Title II, § 219, Oct. 12, 1984, 98 Stat. 2027; Pub.L. 99–570, Title I, § 1052, Oct. 27, 1986, 100 Stat. 3207–8; Pub.L. 100–690, Title VI, §§ 6371, 6480, Nov. 18, 1988, 102 Stat. 4370, 4382; Pub.L. 101–647, Title XII, § 1201, Title XIX, § 1907, Nov. 29, 1990, 104 Stat. 4829, 4854; Pub.L. 104–237, Title II, § 201(a), Oct. 3, 1996, 110 Stat. 3101; Pub.L. 104–305, § 2(c), Oct. 13, 1996, 110 Stat. 3808.)

HISTORICAL AND STATUTORY NOTES

References in Text

"This subchapter", referred to in subsec. (a), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables.

"Subchapter II of this chapter", referred to in subsec. (a), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1106 of Title III, see Tables.

Effective and Applicability Provisions

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 91–513, set out as a note under § 801 of this title.

§ 844a. Civil penalty for possession of small amounts of certain controlled substances

(a) In general

Any individual who knowingly possesses a controlled substance that is listed in section 841(b)(1)(A) of this title in violation of section 844 of this title in an amount that, as specified by regulation of the Attorney General, is a personal use amount shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

(b) Income and net assets

The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this section or to prosecute the individual criminally. However, in determining the amount of a penalty under this section, the income and net assets of an individual shall be considered.

(c) Prior conviction

A civil penalty may not be assessed under this section if the individual previously was convicted of a Federal or State offense relating to a controlled substance.

(d) Limitation on number of assessments

A civil penalty may not be assessed on an individual under this section on more than two separate occasions.

(e) Assessment

A civil penalty under this section may be assessed by the Attorney General only by an order made on the record after opportunity for a hearing in accordance with section 554 of Title 5. The Attorney General shall provide written notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a request for the hearing before the expiration of the 30-day period beginning on the date such notice is issued.

(f) Compromise

The Attorney General may compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(g) Judicial review

If the Attorney General issues an order pursuant to subsection (e) of this section after a hearing described in such subsection, the individual who is the subject of the order may, before the expiration of the 30-day period beginning on the date the order is issued, bring a civil action in the appropriate district court of the United States. In such action, the law and the facts of the violation and the assessment of the civil penalty shall be determined de novo, and shall include the right of a trial by jury, the right to counsel, and the right to confront witnesses. The facts of the violation shall be proved beyond a reasonable doubt.

APPENDIX D

21 U.S.C. § 851

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub.L. 91-513, Title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

07

FILED
SEP 28 1999
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

JAMES EDWARD PRICE,	§	
Movant,	§	
	§	
v.	§	**CIVIL ACTION NO. W-99-CA-287**
	§	**CRIMINAL NO. W-98-CR-054**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

ORDER

Before the Court is Movant's Motion to Set Aside or Correct Sentence made pursuant to 28 U.S.C.A. §2255. The Court, having considered same, finds that an answer would be appropriate in this case. Accordingly,

It is **ORDERED** that Respondent shall serve its answer within sixty (60) days after the service of the Movant's Motion to Vacate, Set Aside or Correct Sentence.

It is further **ORDERED** that Movant shall serve upon Respondent or, if appearance has been entered by counsel, upon its attorney, a copy of every further pleading or other document submitted for consideration by the Court. Movant shall include with the original papers to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to Respondent or its counsel. Any paper received by a District Judge or Magistrate which has not been filed with the Clerk or which fails to include a Certificate of Service will be disregarded by the Court. It is further

10

ORDERED that the Clerk of the Court forward a copy of Movant's Motion to the United States Attorney's Office.

SIGNED this 28 day of September, 1999.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FILED
OCT 04 2000
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

WESTERN DISTRICT OF TEXAS

JAMES EDWARD PRICE
Plaintiff

V.

UNITED STATES OF AMERICA
Defendant

JUDGMENT IN A CIVIL CASE

Case Number: W-98-CR-54
W-99-CA-287

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issued have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that Movant's Motion to Vacate, Set Aside, or Correct Sentence under the provisions of 28 U.S.C. § 2255 is **DENIED**. It is further

ORDERED that this case is **DISMISSED.**

October 4, 2000
Date

William G. Putnicki
Clerk

(By) Deputy Clerk

Request Requested

No. 01-10940 (3)

Supreme Court, U.S.
FILED
SEP 30 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

JAMES EDWARD PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

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Washington, D.C. 20530-0001
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SUPREME COURT, U.S.

20 pp

QUESTION PRESENTED

Whether petitioner's trial and appellate counsel were ineffective for failing to challenge his conviction under 18 U.S.C. 924(c) on the ground that he did not commit a predicate felony drug trafficking crime.

BEST AVAILABLE COPY

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-10940

JAMES EDWARD PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unpublished, but the judgment is noted at 31 Fed. Appx. 158 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2001. A petition for rehearing was denied on March 20, 2002. The petition for a writ of certiorari was filed on June 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of possession of cocaine base, in violation of 21 U.S.C. 844(a), and using or carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c). He was sentenced to 63 months' imprisonment on the drug possession count, and to a consecutive term of 60 months' imprisonment on the firearm count. The court of appeals affirmed. United States v. Price, 180 F.3d 266 (5th Cir.) (Table), cert. denied, 528 U.S. 944 (1999).

Petitioner then filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion. The court of appeals granted a certificate of appealability (COA) and vacated petitioner's sentence on the drug possession count, but affirmed the denial of petitioner's motion with respect to the firearm count. Pet. App. A, 1-4.

1. On February 20, 1998, a police officer in Hillsboro, Texas stopped petitioner for a traffic violation. When the officer noticed a gun magazine on the dashboard of petitioner's truck, he asked petitioner if there were any weapons in the vehicle, and petitioner showed him a handgun inside a console in the front seat. Petitioner was arrested and transported to the

police station, where officers discovered 78 rocks of crack cocaine hidden in one of petitioner's socks. Gov't C.A. Br. 4-6; Presentence Report (PSR) ¶¶ 4-10.

2. A federal grand jury returned an indictment charging petitioner with possession of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count One), and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Count Two). Pet. App. A, 1-2; C.A. App. Tab 2. At trial, petitioner stipulated that the substance seized by the Hillsboro police was "6.7 grams of cocaine base." Gov't C.A. Br. 5; Trial Tr. (8/5/98) 20-21. Petitioner testified in his own defense, claiming that he had found the cocaine base on the street and had intended to take it to a local law enforcement officer when he was stopped by the police. Gov't C.A. Br. 6; Trial Tr. (8/5/98) 75-78.

With respect to the drug trafficking count, the district court instructed the jury that, if it did not find beyond a reasonable doubt that petitioner intended to distribute the cocaine base, it could find him guilty of the lesser included offense of possession of cocaine base. Pet. App. A, 2; C.A. App. Tab 4. With respect to the firearm count, the court explained that, in order to return a guilty verdict, the jury

had to find that petitioner "committed the crime alleged in Count One of the Indictment" and that he "knowingly used or carried a firearm during and in relation to [his] alleged commission of the crime charged in Count One of the Indictment." C.A. App. Tab 5. In response to a question from the jurors, the court stated that "[a] 'drug trafficking crime' means any felony punishable under the Controlled Substances Act. Possession with intent to distribute cocaine base and possession of more than five grams of cocaine base are both felony offenses." C.A. App. Tab 6. The jury found petitioner not guilty of possession of cocaine base with intent to distribute, but guilty of simple possession of cocaine base and guilty on the firearm count. Pet. App. A, 2; C.A. App. Tab 7.

The presentence report determined that petitioner's drug possession offense involved 6.67 grams of crack cocaine, resulting in a base offense level of 26 under Guidelines § 2D1.1(c)(7). PSR ¶¶ 20-21; see Guidelines § 2D2.1(b)(1) (providing that a defendant convicted of possession of more than five grams of cocaine base should be sentenced under Section 2D1.1 "as if the defendant had been convicted of possession * * * with intent to distribute"). The report also determined that petitioner fell within criminal history category I, although it noted that he had several prior state

convictions, including a 1976 conviction for possession of marijuana and a 1988 conviction for possession of a controlled substance.[1] PSR ¶¶ 32-36. Thus, petitioner's Guidelines sentencing range on Count One was 63 to 78 months' imprisonment. PSR ¶ 62. The district court adopted the factual findings and guidelines applications in the presentence report, and sentenced petitioner to 63 months' imprisonment on Count One and to a consecutive term of 60 months' imprisonment on Count Two. Sent. Tr. (10/1/98) 10; C.A. App. Tab 8.

On appeal, petitioner argued that the evidence was insufficient to prove the requisite nexus between the firearm and the drug offense, that the district court erred in instructing the jury on the "in relation to" element of the firearm offense, and that the district court should have required the jury to continue to deliberate after it returned a verdict form that was altered.[2] Pet. App. A, 2; C.A. App. Tab 10. The court of appeals affirmed, United States v. Price, 180 F.3d 266 (5th Cir.) (Table), and this Court denied certiorari,

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[1] The report noted that petitioner stated during the presentence interview that the 1988 conviction was later dismissed. PSR ¶ 35.

[2] Consistent with the district court's instructions on the firearm offense, the jury changed the description of Count Two on the verdict form from "Using and Carrying a Firearm" to "Using or Carrying a Firearm." C.A. App. Tab 7.

528 U.S. 944 (1999).

3. In 1999, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. C.A. App. Tabs 11-13. He claimed that his sentence on the drug possession count exceeded the one-year statutory maximum under 21 U.S.C. 844(a); that the drug possession offense was a misdemeanor, not a felony, and therefore did not constitute a valid predicate "drug trafficking crime" under Section 924(c); that his trial and appellate counsel were ineffective in failing to raise those claims; and that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to point out that his sentence exceeded the statutory maximum. Pet. App. A, 2; see C.A. App. Tabs 11-13. The district court denied the Section 2255 motion and rejected petitioner's request for a COA. Pet. App. A, 2. The court of appeals granted a COA on petitioner's ineffective assistance claims and reversed in an unpublished per curiam decision. Pet. App. A, 1-4.

a. With respect to the drug possession count, the court concluded that petitioner's 63-month sentence exceeded the statutory maximum under 21 U.S.C. 844(a), and that his trial and appellate attorneys rendered ineffective assistance by failing to cite "directly controlling precedent" to that effect. Pet. App. A, 2-4 (citing United States v. Deisch, 20 F.3d 139 (5th

Cir. 1994), overruled on other grounds, United States v. Doggett, 230 F.3d 160, 164-165 (5th Cir. 2000)). Section 844(a) establishes a maximum penalty of one to three years' imprisonment for possession of any quantity of a "controlled substance," but increases the maximum to 20 years for those convicted of possessing more than five grams of cocaine base.[3] Petitioner's sentence of 63 months' imprisonment was imposed on the basis of that 20-year maximum. The court held that such a sentence was erroneous: Under Deisch, possession of more than five grams of cocaine base "'cannot be a lesser included offense under an indictment charging possession with intent to

[3] Section 844(a) provides, in pertinent part:

> Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, * * * except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years, * * * except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for * * * not more than 3 years * * * . Notwithstanding the preceding sentence, a person convicted under this subsection for possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years * * * if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams * * * .

distribute in violation of section 841(a)(1),'" because drug type and quantity are elements of the former offense but not the latter. Pet. App. A, 3 (quoting Deisch, 20 F.3d at 152). Nevertheless, the court explained, petitioner properly could have been sentenced to up to three years' imprisonment under Section 844(a)'s general prohibition on possession of a controlled substance. It remanded for resentencing on that count. Pet. App. A, 4.[4]

b. With respect to the firearm count, petitioner argued that his attorneys were ineffective in failing to challenge his conviction on the ground that his drug possession offense was not a felony and therefore could not serve as a predicate "drug trafficking crime" under Section 924(c). Pet. App. A, 4; see 18 U.S.C. 924(c)(2) (defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act"). A federal offense is classified as a felony if the "maximum term of imprisonment authorized" is more than one year. 18 U.S.C. 3559(a); see also 21 U.S.C. 802(13) (defining "felony" for

[4] On re-sentencing, the district court sentenced respondent to 24 months' imprisonment on the Section 844 count, based on the enhanced penalty for recidivists. Re-sent. Tr. (5/22/02) 14. Respondent has appealed that sentence on the ground that the enhancement provision is inapplicable where, as here, the government did not file the requisite notice under 21 U.S.C. 851(a). Petitioner's Section 924(c) conviction is not at issue in the pending appeal.

purposes of the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State law as a felony"). Petitioner maintained that his drug possession offense could not be so classified because Section 844(a) prescribes a base penalty of "not more than 1 year."

The court of appeals rejected that argument. It explained that, although possession of a controlled substance would be a misdemeanor for a first-time offender, Section 844(a) authorizes a sentence of up to three years in cases where the defendant has prior drug-related convictions. Pet. App. A, 4. According to the presentence report, petitioner pleaded guilty to drug offenses in 1976 and 1988.[5] Pet. App. A., 4 n.7. Therefore, the court concluded, "[h]ad [petitioner] been correctly sentenced under § 844(a), the [district] court would have noted his two prior drug convictions" and petitioner "would have faced a statutory maximum of either two or three years, rendering his drug possession a felony under § 924(c)(1)." Pet. App. A, 4 (footnote omitted).

Petitioner filed a petition for rehearing, arguing that despite his prior convictions, his drug possession offense was subject to the one-year statutory maximum because the government

[5] The court noted that petitioner claimed that the "latter conviction has been vacated." Pet. App. A, 4 n.7.

had not filed an information pursuant to 21 U.S.C. 851 setting forth his prior convictions. See 21 U.S.C. 851(a) ("No person [convicted of a drug offense] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."). The court of appeals denied the petition without opinion. Pet. App. B.

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals erred in upholding his conviction under 18 U.S.C. 924(c) because, given the government's failure to provide the notice required by 21 U.S.C. 851(a), his drug possession offense could not carry a sentence of more than one year and therefore could not serve as a predicate "drug trafficking crime" under Section 924(c).[6] We agree with petitioner that, in the absence of proper

[6] Petitioner raised that argument for the first time in his petition for rehearing. In its response, the government did not defend the reasoning of the court of appeals, but argued instead that petitioner waived his Section 851 claim by failing to present it in his 28 U.S.C. 2255 motion or in his briefs on appeal, and that the court of appeals' judgment was correct in any event because "[t]here was overwhelming evidence of the distribution offense" and of the lesser offense of "possession of the stipulated amount of 6.7 grams of crack cocaine," either of which could serve as a predicate felony drug

notice under 21 U.S.C. 851(a), the drug possession offense did not qualify as a felony for purposes of Section 924(c). Nevertheless, petitioner is not entitled to relief on his claim of ineffective assistance of counsel because, even assuming deficient performance by counsel in not raising an objection to the use of the drug possession charge to support the verdict under Section 924(c), petitioner cannot show prejudice: there is no reasonable probability that a rational jury would have failed to find that he possessed the cocaine base with the intent to distribute. Accordingly, the judgment below is correct and the court of appeals' unpublished decision does not warrant this Court's review.

1. The court of appeals rejected petitioner's ineffective assistance of counsel challenge to his Section 924(c) conviction on the ground that, had petitioner properly been sentenced under the provision of Section 844(a) prescribing penalties for simple possession of a controlled substance, his prior convictions would have exposed him to a maximum penalty of two to three years' imprisonment, making his possession offense a felony for purposes of Section 924(c). See Pet. App. A, 4. That reasoning is incorrect. Section 924(c)(2) provides that, "[f]or purposes

trafficking offense for purposes of Section 924(c). Gov't C.A. Resp. Br. 5-6, 8-9; see also Gov't C.A. Br. 15-18. The court of appeals denied rehearing without opinion. Pet. App. B.

of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act." A drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a). Because no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c).

Petitioner also argues that the court of appeals' decision conflicts directly with this Court's holding in United States v. LaBonte, 520 U.S. 751 (1997). In LaBonte, the Court addressed the meaning of 28 U.S.C. 994(h), which directs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" in cases involving certain repeat offenders. The Sentencing Commission had interpreted that provision to mean that, where Congress enacted a base penalty for first-time offenders and an enhanced penalty for recidivists, the base sentence was the "maximum term authorized" for all defendants convicted of the same crime. LaBonte, 520 U.S. at 754-755. The Court rejected that view, holding that, for repeat drug offenders who received the proper notice under

21 U.S.C. 851(a), "the 'maximum term authorized' is the enhanced term." Id. at 759-760. The Court made clear, however, that for first-time offenders and "defendants who did not receive the notice, the unenhanced maximum applies." Id. at 760. While LaBonte arose in a different statutory context and is not controlling here, its reasoning supports the conclusion that petitioner's drug possession offense could not be treated as a felony by virtue of petitioner's recidivism, given the government's failure to file a notice of enhancement under 21 U.S.C. 851(a).

2. Nevertheless, this case does not warrant further review. The court of appeals' unpublished opinion has no precedential effect, even within the Fifth Circuit, see 5th Cir. R. 47.5.4, and its judgment is correct. The question before the court of appeals was whether petitioner's trial and appellate counsel were ineffective for failing to challenge his Section 924(c) conviction on the grounds petitioner now advances. In order to prevail on that claim, petitioner must establish that counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Petitioner has not satisfied that

standard.

At trial, in response to a question from the jury, the court instructed that the jury could find petitioner guilty under Section 924(c) based on his use of a gun in connection with either of two drug trafficking offenses: possession with intent to distribute, or possession of more than five grams of cocaine base. The government assumes for purposes of this case that counsel was deficient in failing to object to the inclusion of the possession offense as a possible predicate for the Section 924(c) charge. Nevertheless, petitioner cannot show prejudice under the Strickland standard. Any rational jury that found that petitioner possessed the cocaine base that was concealed in his sock, and that rejected petitioner's explanation that he had found the drugs on the street, also would have concluded that he possessed the drugs with intent to distribute.

The evidence presented at trial showed that, when he was arrested, petitioner had more than 70 rocks of "crack" cocaine hidden in his sock, that the typical user buys only one or two rocks at a time, and that the drugs in petitioner's possession had a street value of up to $1,200. Trial Tr. (8/5/98) 60. The jury also heard testimony that the pistol found in petitioner's vehicle -- an inexpensive model that the government's witness described as "basically a throw-down gun" -- was the type of

weapon often carried by "mid-level" and "smaller" dealers in order to "protect themselves from other drug dealers or being ripped off." Id. at 61. That evidence overwhelmingly established that petitioner possessed the cocaine base with intent to distribute it, and that he "use[d] or carr[ied] a firearm during and in relation to the commission of [that] drug trafficking crime." C.A. App. Tab 7.

It is immaterial that the jury chose not to find petitioner guilty on the separate charge of possession with intent to distribute; juries are entitled to render compromise verdicts, and "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." Harris v. Rivera, 454 U.S. 339, 345 (1981); see also United States v. Powell, 469 U.S. 57 (1984) (reaffirming general rule that inconsistent verdicts can stand). A defendant may be convicted under Section 924(c) even if the government did not obtain a conviction on the predicate drug trafficking offense. "[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate." United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990); cf. United States v. Ruiz, 986 F.2d 905, 911 (5th Cir. 1993) (affirming Section 924(c) conviction despite acquittal on drug trafficking charge). Accordingly, petitioner cannot demonstrate a reasonable probability that the result of

the proceedings would have been different had counsel argued that a simple drug possession offense cannot serve as a valid predicate for a conviction under Section 924(c), or that his conviction was invalid given his acquittal on the charge of possession with intent to distribute. See Strickland, 466 U.S. at 694.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2002

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01 10940

No. _____

In the Supreme Court of the United States

October Term, 2001

Supreme Court, U.S.
FILED
JUN 18 2002
OFFICE OF THE CLERK

JAMES EDWARD PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

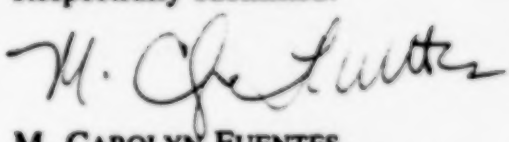
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Petitioner James Edward Price, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis,* and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964,

as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.



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DATED: June 18, 2002.

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No. 01-10940

In the Supreme Court of the United States

October Term, 2001

JAMES EDWARD PRICE, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR THAT THE GOVERNMENT NOW CONCEDES OCCURRED. (Responsive to Gov't Br. 10–13.) 2

II. THE GOVERNMENT'S LACK-OF-PREJUDICE ARGUMENT MUST BE REJECTED. (Responsive to Gov't Br. 13–16.) 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Lawrence ex rel. Lawrence v. Chater,
516 U.S. 163 (1996) 4–5, 7

Netherland v. Tuggle,
515 U.S. 951 (1995) 3

Strickland v. Washington,
466 U.S. 668 (1984) 4

United States v. LaBonte,
520 U.S. 751 (1997) 1, 3, 6

United States v. Powell,
469 U.S. 57 (1984) 5

United States v. Reyes,
102 F.3d 1361 (5th Cir. 1996) 6

United States v. Solomon,
29 F.3d 961 (5th Cir. 1994) 6

Statutes

18 U.S.C. § 924(c) 1, 2, 3, 6, 7

18 U.S.C. § 924(c)(1)(A) 3

21 U.S.C. § 841 . . . . . 1, 5

21 U.S.C. § 851(a) 1, 3, 4

Rules

Fifth Circuit Rule 47.5.4 4

Supreme Court Rule 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner James Edward Price files this Reply to the Brief for the United States in Opposition to his petition for writ of certiorari.

INTRODUCTION

Price petitions for certiorari because the Fifth Circuit's ruling that he faced an enhanced statutory maximum on his simple drug possession conviction conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997). The ruling that Price faced the enhanced maximum converted Price's simple possession offense from a misdemeanor to a felony, permitting his conviction for carrying a firearm during a drug felony to stand under 18 U.S.C. § 924(c).[1]

The Government concedes that, under *LaBonte*, "petitioner's drug possession offense could not be treated as a felony . . . given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a)." Gov't Br. 13. It also concedes that the Fifth Circuit's "reasoning is incorrect," and "that, in the absence of a proper notice under 21 U.S.C. 851(a), [Price's] drug possession offense did not qualify as a felony for the purposes of Section 924(c)." *Id.* 10–11. It finally concedes that, "[b]ecause no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c)." *Id.* 12.

1. Price was charged with possession of cocaine base with intent to distribute, under 21 U.S.C. § 841, and carrying a firearm during that drug felony, under 18 U.S.C. § 924(c). He was acquitted of the distribution charge, found guilty of simple possession, and found guilty of the firearm count. Pet. for Cert., App. A at 1–2.

Despite these concessions, the Government argues that no further review is warranted because the Fifth Circuit's opinion lacks precedential effect. This argument should be rejected. The Government's concession of error before this Court is a recognized and equitable reason for granting certiorari, vacating judgment, and remanding for further consideration, regardless of the decision's precedential value.

The Government also argues against further review because Price cannot show prejudice. Gov't Br. 14. According to the Government, no prejudice exists because there is no reasonable probability that a rational jury would have failed to find Price possessed cocaine base with intent to distribute—an offense that would support a § 924(c) conviction. *Id.* Price replies that this argument ignores that Price's jury acquitted him of this very charge. Given the jury's acquittal on the possession-with-intent-to-distribute charge, the Government's theory that there was no prejudice must be rejected.

For all these reasons, the Court should grant certiorari to correct the error that the Government now concedes occurred.

ARGUMENTS

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE ERROR THAT THE GOVERNMENT NOW CONCEDES OCCURRED. (Responsive to Gov't Br. 10–13.)

Although the Government initially argued that the Fifth Circuit's decision was correct,[2] it now concedes that the court of appeals' "reasoning

2. The Government asserts that it "did not defend the reasoning of the court of appeals," in its response to Price's petition for rehearing in the Fifth Circuit. Gov't Br. 10 n.6. The Government is mistaken. In its response, the Government argued that the Fifth Circuit "correctly stated that, in the hypothetical realm, had

(continued...)

is incorrect." Gov't Br. 11. Under *LaBonte*, Price's "drug possession offense could not be treated as a felony[.]" Gov't Br. 13 (citing 520 U.S. at 760). Consequently, that offense "did not qualify as a felony for purposes of Section 924(c)." Gov't Br. 11. And, "the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c)." *Id.* 12. This confession of error in the Fifth Circuit's decision is a ground for granting certiorari, vacating the judgment, and remanding for reconsideration of *LaBonte*'s effect on the Fifth Circuit's ruling. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68, 172 (1996) (confession of error in court of appeals' decision ground for GVR).

Indeed, a "GVR order" is particularly appropriate for flagging an issue that the court of appeals appears not to have fully considered. *Lawrence*, 516 U.S. at 167; *cf. Netherland v. Tuggle*, 515 U.S. 951 (1995) (vacating stay order for probable failure to apply 12-year-old Supreme Court precedent). As the Fifth Circuit did not mention *LaBonte* in making its ruling, and as that ruling conflicts with *LaBonte*, it is likely that the court of appeals overlooked the significance of this case and the issue it presented

---

2. (...continued)
Price been correctly sentenced under § 844, the sentencing court could have noted his two prior drug convictions, imposed a sentence of either two or three years, and thus, his drug possession would have been rendered a drug-possession felony under § 924(c)(1)." Gov't Reh. Resp. 8. And, it dismissed as "without merit" Price's complaint that the lack of a § 851 enhancement notice "renders the possibility of a § 851 enhancement improper." *Id.*

in Price's appeal.[3] Regardless of the precedential significance of the Fifth Circuit's decision in Price's case,[4] this Court should exercise its discretion to grant a GVR order because the Government's concession casts substantial doubt on the correctness of the court of appeals' decision. *See Lawrence*, 516 U.S. at 170 (finding GVR appropriate when recent events cast substantial doubt on correctness of lower court's disposition).

II. THE GOVERNMENT'S LACK-OF-PREJUDICE ARGUMENT MUST BE REJECTED. (Responsive to Gov't Br. 13–16.)

The Government argues that Price is "not entitled to relief on his claim of ineffective assistance of counsel because, even assuming deficient performance by counsel . . . petitioner cannot show prejudice: there is no reasonable probability that a rational jury would have failed to find that he possessed the cocaine base with the intent to distribute." Gov't Br. 11; *see Strickland v. Washington*, 466 U.S. 668, 694 (1984) (prejudice shown if reasonable probability that result of the proceeding would have been different). Possession with intent to distribute is a felony that could

---

3. The Government notes that Price raised the absence of a § 851 enhancement notice for the first time in his petition for rehearing. Gov't Br. 10 n.6. That is because neither party briefed the issue on appeal. Reh. Pet. 1. The law prohibited recidivist enhancement of Price's simple possession offense in the absence of an enhancement notice, and there was no reason to anticipate that the court of appeals would decide Price's case based on the possibility of an enhancement that the law forbade. The rehearing petition was filed precisely because the Fifth Circuit overlooked the applicable law, and the fact that no enhancement had been filed. *Id.* 1–2. Had the Government conceded then—as it concedes now—that no enhancement was possible, the outcome of Price's appeal likely would have been different.

4. Under Fifth Circuit local rules, an unpublished opinion is not precedent, but may be persuasive authority. 5TH CIR. R. 47.5.4.

theoretically support a § 942(c) conviction. *See* 21 U.S.C. § 841 (possession with intent to distribute punishable by more than one year).

The Government's argument must be rejected, given that the jury at Price's trial actually did acquit him of possessing cocaine base with intent to distribute. Price's indictment charged him with possession of cocaine base with intent to distribute. App. A at 1–2. The jury acquitted him of that offense, but convicted him of the offense of simple possession of a controlled substance. *Id.* at 2. The fact that a jury did acquit Price of possession with intent to distribute shows that there is at least a reasonable probability that such acquittal could occur, and thus defeats the Government's lack-of-prejudice argument.

Seeking to avoid this obvious conclusion, the Government contends that "[i]t is immaterial that the jury chose not to find petitioner guilty on the separate charge of possession with intent to distribute; juries are entitled to render compromise verdicts[.]" Gov't Br. 15 (citing, inter alia, *United States v. Powell*, 469 U.S. 57 (1984)). But the law governing compromise verdicts assumes that the jury rendering such verdicts was correctly instructed to begin with. *See Powell*, 469 U.S. at 66 (jurors expected to follow law as charged).[5]

5. If a jury is correctly instructed, but nonetheless returns inconsistent verdicts, the verdicts will be viewed as a jury compromise that will not be disturbed on appeal. *See Powell*, 469 U.S. at 65 (noting that inconsistent verdicts occur when jury fails to follow court's instructions). If the jury was not correctly instructed, it cannot be assumed that a compromise verdict was rendered.

The jury was not correctly instructed at Price's trial.[6] The indictment charged Price with violating 18 U.S.C. § 924(c) by using or carrying a firearm during a specific drug-trafficking offense, "to wit: Possession with Intent to Distribute cocaine base." However, the district court's jury instructions permitted the jury to convict Price for using or carrying a firearm during a different predicate offense, possession of over 5 grams of cocaine base. *United States v. Price*, No. 00-51078, Defendant-Appellant's Br. 17–20 (May 11, 2001). Under Fifth Circuit law, those instructions constructively amended the indictment. *United States v. Reyes*, 102 F.3d 1361, 1364–65 (5th Cir. 1996). In the Fifth Circuit, this was reversible error. *United States v. Solomon*, 29 F.3d 961, 964–65 (5th Cir. 1994). Thus, Price argued on appeal that counsel was ineffective for failing to object to the jury instruction on the § 924(c) offense that constructively amended the indictment.[7]

The Fifth Circuit avoided deciding the jury instruction issue by finding that Price's § 924(c) conviction could be upheld on the alternative ground that his simple drug possession offense was enhanceable as felony. Pet. for Cert., App. A (no mention of jury instruction argument). But—as the Government now concedes—*LaBonte*'s reasoning precluded Price's simple possession offense from being treated as a felony. Gov't Br. 13 (citing 520 U.S. at 760).

6. See *United States v. Price*, No. 00-51078, Defendant-Appellant's Br. 17–24 (May 11, 2001), and Defendant-Appellant's Reply Br. 9–14 (July 9, 2001).

7. *Id.*

Given the Fifth Circuit's clear precedent requiring reversal for the type of constructive amendment that occurred in Price's case, it is likely that Price would have prevailed on his ineffective-assistance-of-counsel claim if the court of appeals had not found an alternative, albeit incorrect, ground for affirming the § 924(c) conviction. This is an additional reason for issuing a GVR order in Price's case. A GVR order may be issued "on the basis of a *reasonable probability* that giving the lower court the opportunity to consider that point anew will alter the result." *Lawrence*, 516 U.S. at 171–72 (emphasis in original). As the Government concedes, the Fifth Circuit cannot uphold Price's § 924(c) conviction on the theory it relied upon in its opinion. Giving the court an opportunity to consider this point anew will likely alter the result of Price's appeal.

CONCLUSION

FOR THESE REASONS, and for the reasons set out in Price's petition, the Court should grant certiorari, vacate the judgment, and remand for further consideration.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

JAMES EDWARD PRICE *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01–10940. Decided January 21, 2003

The motion of petitioner for leave to proceed *in forma pauperis* is granted, the petition for certiorari is granted, and the judgment of the United States Court of Appeals for the Fifth Circuit is vacated. The case is remanded for further consideration in light of *United States* v. *LaBonte*, 520 U. S. 751, 759–760 (1997), and the Solicitor General's acknowledgement that the Court of Appeals "erred in concluding that petitioner's drug possession offense qualified as a predicate felony" under 18 U. S. C. §924(c) in the absence of notice under 21 U. S. C. §851(a). Brief in Opposition 12.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Five Members of this Court have previously expressed their disapproval of vacating and remanding a Court of Appeals decision favorable to the Government in response to the Government's acknowledgment of error, not in the *judgment* below, but merely in the *reasoning* on which the lower court relied. See *Lawrence* v. *Chater*, 516 U. S. 163, 183 (1996) (SCALIA, J., joined by THOMAS, J., dissenting). See also *Alvarado* v. *United States*, 497 U. S. 543, 545–546 (1990) (REHNQUIST, C. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissenting). I write to record my continuing conviction that, in general, we have no *power* to vacate a judgment that has not been shown to be (or been conceded to be) in error; to explain why the Government's concession of error in reasoning does not in any way undermine the Fifth Circuit's judgment; and (while I am at

it) to explain why the judgment here, insofar as the issues raised in this petition are concerned, is quite obviously correct.

I

On February 20, 1998, a police officer stopped petitioner's truck for a traffic violation and noticed a gun magazine on the dashboard. When asked if he had any weapons in the vehicle, petitioner produced a handgun. The officer then arrested petitioner and took him to the police station, where crack cocaine was discovered in his socks. An ensuing indictment charged petitioner with one count of possession of cocaine base with intent to distribute in violation of 21 U. S. C. §841(a)(1),[1] and one count of using and carrying a firearm during a drug trafficking crime in violation of 21 U. S. C. §924(c).[2] At trial, the District Court instructed the jury that they could convict petitioner of the lesser included offense of simple possession of a controlled substance, see 21 U. S. C. §844(a),[3] if

[1] Section 841(a)(1) provides:

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[2] Section 924(c)(1)(A) imposes penalties on "any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm . . . ."

[3] Section §844(a) provides:

"It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram."

they chose to acquit petitioner as to §841(a)(1). The District Court further instructed the jury that either possession with intent to distribute or simple possession of cocaine base would be a felony offense that could serve as an underlying "drug trafficking crime" to support a conviction under 18 U. S. C. §924(c).

The jury acquitted petitioner of possession with intent to distribute but convicted him of the lesser included offense of simple possession. The jury also returned a guilty verdict on the §924(c) charge. The District Court imposed a 63-month sentence for the 21 U. S. C. §844(a)

offense and a consecutive 60-month sentence under 18 U. S. C. §924(c). The Fifth Circuit affirmed on direct appeal. See *United States* v. *Price*, 180 F. 3d 266, cert. denied, 528 U. S. 944 (1999).

Petitioner then filed a 28 U. S. C. §2255 motion, claiming that: (1) his 63-month sentence under 21 U. S. C. §844(a) exceeded the maximum authorized punishment; (2) his simple possession conviction was a misdemeanor and therefore could not constitute a "drug trafficking crime" for his 18 U. S. C. §924(c) conviction; and (3) his trial and appellate counsel rendered ineffective assistance in failing to raise these claims at trial and on direct appeal. The District Court denied the motion, but the Fifth Circuit granted a certificate of appealability as to the ineffective-assistance claims. On the merits of the appeal, the Fifth Circuit concluded that petitioner's attorneys should have objected to the 63-month sentence imposed by the District Court under 21 U. S. C. §844(a), and that their failure to do so violated petitioner's Sixth Amendment rights under *Strickland* v. *Washington*, 466 U. S. 668 (1984). This was so, the Fifth Circuit explained, because the trial court must have sentenced petitioner under the third sentence of §844(a),[4] the only part of the statute allowing a sentence as high as 63 months (it requires 5 to 20 years for simple possession of five grams or more of a mixture or substance that contains cocaine base). But since the third sentence of §844(a) is not a lesser included offense of §841(a)(1), it cannot qualify as the offense of conviction under the indictment and the lesser-included instruction in this case. The Fifth Circuit further held that petitioner suffered prejudice because he would have

[4] The court was referring to the sentence beginning with the word "Notwithstanding." This is actually the *fourth* sentence of §844(a), but my discussion will accept the Court of Appeals' math.

received a lighter sentence under §844(a) but for his attorneys' errors.

The Fifth Circuit refused, however, to grant habeas relief as to petitioner's 18 U. S. C. §924(c) conviction, rejecting petitioner's contention that his 21 U. S. C. §844(a) conviction could not serve as a "drug trafficking crime" under 18 U. S. C. §924(c) because it was not a felony offense. See §924(c)(2) ("For purposes of this subsection, the term 'drug trafficking crime' means *any felony* punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act") (emphasis added; citations omitted). As petitioner saw matters, the maximum prison sentence he could receive under 21 U. S. C. §844(a) was one year. §844(a) ("Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both . . ."). The Fifth Circuit disagreed, claiming that if the trial court had correctly sentenced petitioner under §844(a), it would have noted his two prior drug convictions, making him eligible for a 2-year prison sentence. *Ibid.* (providing increased sentence for defendants with a "prior conviction] for any drug, narcotic, or chemical offense chargeable under the law of any State"). In the Fifth Circuit's view, this rendered petitioner's §844(a) offense a felony, see 18 U. S. C. §3559(a) (any offense for which a sentence of more than one year may be imposed is a felony), and meant that his counsel could not be faulted for failing to challenge the §924(c) conviction.

Petitioner now seeks review of the Fifth Circuit's denial of habeas relief with respect to his §924(c) conviction. In his petition for certiorari, petitioner argues that the maximum punishment for his 21 U. S. C. §844(a) offense was one year because the Government did not file a notice, in advance of trial, that it would seek to rely on petitioner's prior drug convictions to obtain an increased

punishment. See §851(a)(1);[5] *United States* v. *LaBonte*, 520 U. S. 751, 754, n. 1 (1997) ("If the Government does not file such notice, . . . the lower sentencing range will be applied even though the defendant may otherwise be eligible for the increased penalty"). Petitioner claims that, absent a §851(a)(1) notice, his conviction under §844(a) was only a misdemeanor and could not be used to support a conviction under 18 U. S. C. §924(c). The Government concedes that "petitioner's drug possession offense could not be treated as a felony . . . given the government's failure to file a notice of enhancement under 21 U. S. C. §851(a)," and thus acknowledges that the Fifth Circuit's "*reasoning* is incorrect." Brief in Opposition 13, 10–11 (emphasis added). The Government maintains, however, that the Fifth Circuit's judgment denying habeas relief is proper. *Id.*, at 14.

II

This Court has no grounds on which to set aside the Fifth Circuit's judgment, since the Government has not conceded error in that judgment—and indeed insists that it is correct. Moreover, even a cursory evaluation of petitioner's contentions reveals that the Fifth Circuit's judgment was entirely correct. Petitioner cannot establish a *Strickland* claim with respect to his 18 U. S. C. §924(c) conviction because that conviction was proper.

[5] Section 851(a)(1) provides:

"No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence."

The jury found petitioner guilty, beyond a reasonable doubt, of having committed a drug trafficking crime while using or carrying a firearm. The trial court had instructed the jury:

> "'A "drug trafficking crime" means any felony punishable under the Controlled Substances Act. Possession with intent to distribute cocaine base and possession of more than five grams of cocaine base are both felony offenses.'" Brief in Opposition at 4.

This instruction correctly stated the law. Simple possession of more than five grams of cocaine base is a felony because it is punishable by a mandatory minimum sentence of five years of imprisonment (even without any prior convictions). See §924(c)(2); 21 U. S. C. §844(a). And there was ample evidence to support a finding that petitioner committed such a felony while using or carrying a firearm: He stipulated that the amount of cocaine base seized by the police was 6.7 grams.

The fact (noted by the Fifth Circuit) that petitioner was not *convicted* of possession of more than five grams of cocaine base is not relevant to his 18 U. S. C. §924(c) conviction. Section 924(c) does not require that the defendant be *convicted* of the underlying "drug trafficking crime," but merely that he be found beyond a reasonable doubt to have *committed* such a crime while using or carrying a firearm. *Young* v. *United States*, 124 F. 3d 794, 800 (CA7 1997). Since he was so found (the §924(c) conviction must have been based on the simple-possession instruction, since the jury acquitted petitioner of the separate 21 U. S. C. §841 charge of possession with intent to distribute), and since there was ample evidence to support that finding, neither trial nor appellate counsel was ineffective for failing to challenge the 18 U. S. C.

§924(c) conviction.

* * *

For the foregoing reasons I respectfully dissent from today's judgment and would deny the petition for certiorari.

(6)

SUPREME COURT OF THE UNITED STATES

JAMES EDWARD PRICE v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-10940. Decided January 21, 2003

JUSTICE KENNEDY, dissenting.

For the reasons JUSTICE SCALIA explains in his dissent from today's judgment, *ante*, at 6–7, in my view, our holding in *United States* v. *LaBonte*, 520 U. S. 751 (1997), has no bearing upon the question whether the petitioner received ineffective assistance of counsel and does not suggest a result different from that reached by the Court of Appeals. For this reason, I too dissent from the judgment of the Court and would deny the petition for certiorari.